Supreme Court, U.S.
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No. _____

In The Supreme Court of the United States

MARGARET A. BAGLEY, WARDEN,
Petitioner,

v.

FREDERICK WHITE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 97-4066

FREDERICK WHITE,
Petitioner-Appellant,

v.

JAMES SCHOTTEN, WARDEN
Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Ohio at Cleveland.
No. 95-02801 – Patricia A. Gaughan, District Judge.

Argued: June 10, 1999

Decided and Filed: January 26, 2000

Before: KEITH, DAUGHTREY, and MOORE, Circuit Judges.

COUNSEL

ARGUED: Kort W. Gatterdam, PUBLIC DEFENDER'S OFFICE, OHIO PUBLIC DEFENDER COMMISSION, Columbus, Ohio, for Appellant. Stuart W. Harris, OFFICE OF THE ATTORNEY GENERAL, CORRECTIONS

LITIGATION SECTION, Columbus, Ohio, for Appellee. **ON BRIEF:** Kort W. Gatterdam, PUBLIC DEFENDER'S OFFICE, OHIO PUBLIC DEFENDER COMMISSION, Columbus, Ohio, for Appellant. Stuart W. Harris, OFFICE OF THE ATTORNEY GENERAL, CORRECTIONS LITIGATION SECTION, Columbus, Ohio, for Appellee.

OPINION

MARTHA CRAIG DAUGHTREY, Circuit Judge. Petitioner Frederick White appeals the district court's dismissal of his habeas corpus petition, filed pursuant to 28 U.S.C. § 2254. In the petition, White challenges his 1989 state convictions for aggravated murder with a firearm specification, felonious assault with a firearm specification, and possession of a weapon under disability, alleging that his appellate counsel rendered constitutionally ineffective assistance. The district court dismissed the petition on the ground of procedural default, finding that the petitioner had failed to raise the issue of ineffective assistance of counsel within the time limit set by Ohio App. R. 26(B). The district court further found that White was unable to show cause and prejudice for the default.

Under applicable Ohio law, a claim of ineffective assistance is raised by application to reopen the direct appeal. Rule 26(B) provides that the application must be filed within 90 days "from journalization of the appellate judgment." In this case, the petitioner's attorney filed the application some three years after the 90-day period had run. Because an application for reopening the direct appeal in Ohio is part of the direct appeal process, and because a defendant has a right to effective assistance of counsel during that stage of

proceedings, we conclude that the petitioner in this case is able to show cause for his procedural default, i.e., counsel's failure to file a timely application for reopening. However, the issue of whether the petitioner was prejudiced by the alleged constitutional error was not addressed by the district court and is not adequately briefed before us. Hence, we must remand the case to the district court to make that determination and, if it finds that the petitioner has established prejudice, to review the petitioner's constitutional claims on their merits.

PROCEDURAL AND FACTUAL BACKGROUND

The convictions underlying Frederick White's federal petition for habeas corpus arise from the shooting death of his former wife, Kimberly Hawkins White, as she left work. The Ohio Court of Appeals, affirming the petitioner's convictions and sentence on direct appeal, stated the facts of this case as follows:

> [Kimberly Hawkins] White worked as a nurse's assistant at the Mount St. Joseph Nursing Home. At approximately 7:00 a.m., November 5, 1988, White left the nursing home with Jacqueline Glenn and walked toward the van of Richard Gibson, a friend of Glenn's, who was to drive the women home. Glenn testified she entered the van through the front passenger door and, as she began to unlock the rear sliding door, White screamed and pushed Glenn into the van. The women fell onto the floor between the seats. Glenn heard an initial shot and heard White shout, "Wait, Rick, wait." (Tr. 110). According to Glenn, this shot hit White in the leg. Glenn told the jury White's assailant entered the van and again shot White, who stated "Oh, Rick." (Tr. 113). Glenn, who

received powder burns during the shooting, testified she heard three to four shots. She also observed the man's face as he left the van.

In her statement to police immediately after the shooting, Glenn indicated she did not see the man who shot White, nor did this statement include White's identification of her assailant. Two days later, Glenn went to the police station to amplify her initial statement. She then told police of White's references to her assailant as "Rick" and described the man's clothing. Glenn subsequently selected the defendant's picture from an array of five photographs and identified him as the man who shot White.

Richard Gibson, the driver of the van, corroborated Glenn's testimony but was unable to identify the assailant. Gibson told the jury that, as White lay wounded in the van, she stated her husband fired the shots. Euclid police officer Jeffrey Swider responded to the nursing home minutes after the shooting. Swider testified he asked White who shot her and White responded, "My husband." (Tr. 180). Sister Mary Raphael, a nun at the nursing home, also heard White identify her husband as the assailant. White later died in the hospital.

Cuyahoga County Coroner Elizabeth Balraj performed an autopsy on White's body. Her examination revealed a gunshot wound to the left leg as well as an abdominal wound with a perforation of the aorta. Balraj opined White hemorrhaged to death. Barbara Campbell, a member of the coroner's trace evidence department, testified that gun shot residue on White's palms indicated the weapon was fired in close proximity to White.

Kathy Kozel, an assistant at Mount St. Joseph, testified that, as she arrived for work, she observed a man standing outside the nursing home approximately ten minutes before the shooting. Kozel stated she was 12-13 feet from the man and that she looked at his face. Kozel did not see the man fire a gun. Three months later, Kozel selected the defendant's photo from an array as the man she saw outside the nursing home.

Charon Hawkins, the victim's daughter, testified the defendant telephoned her mother the evening before she was killed. According to Hawkins, her mother twice refused to speak with the defendant, who finally threatened "to do something bad" to her mother. (Tr. 235). The daughter also averred the defendant beat her mother many times.

Vivian Faylor Jeff, a counselor at the Cuyahoga County Witness & Family Violence Center, testified she met with White on six to eight occasions and that White was afraid of the defendant. Jeff indicated White had filed a complaint against the defendant and sought a protective order and divorce from him. Mabel Jean Edwards, also a nursing home employee, told the jury she discussed White's domestic problems with the defendant. Edwards averred she "often" saw White with black eyes and bruises on her neck. According to Edwards, White told her the defendant once shot at her and a friend.

Euclid police officer Patrick Lynch testified the defendant's auto was found north of Columbus on the northbound side of Interstate I-71 at 2:14 a.m. the day after the shooting. The left rear tire on the vehicle was flat. Lynch told the jury that highway patrol reports

from the previous day did not refer to the auto. In February 1989, police arrested the defendant in California and brought him back to Cleveland for trial.

The defendant denied killing his former wife and told the jury he was in Columbus at the time of the shooting. He claimed he spent the late afternoon of November 4, 1988 with his current wife, Kimberly Fox White, until she went to work that night. According to the defendant, he left for Cleveland at 7:00 p.m. to visit relatives after learning about the death of an uncle. The defendant stated his auto had a flat tire on Interstate 71 just outside Columbus and he walked to a nearby convenience store to phone for assistance. Unable to secure towing services, the defendant went to a laundromat/restaurant named "Dirty Dungarees" where he met a woman, Rhonda Simon. The defendant introduced himself to her as "Tony Love", a name he used as a radio disc jockey. The woman later drove him to his apartment where she left her telephone number on a magazine. The magazine was introduced into evidence. The defendant gave Simon a record album for bringing him home. The defendant testified that, after Brown left, a neighbor, Andrea Bell, visited him. The defendant asked her to order a pizza for him from her apartment since his telephone was not working.

According to the defendant, he and his wife later tried to retrieve his auto but the battery was dead. They spent the rest of the evening watching videotaped movies. The defendant told the jury he awoke the morning of the slaying at 8:15 and went on errands with his wife. He claimed that, as he left the

apartment complex on errands, he spoke with Bell about the pizza not arriving the previous night. Later that day the defendant learned his former wife had been killed. He acknowledged he left for California after police visited his mother in Cleveland. The defendant stated the police told his mother they would shoot him.

Rhonda Simon corroborated the defendant's testimony as to meeting "Tony Love" at 8:00 p.m. on November 4, 1988 at "Dirty Dungarees." She verified that he told her of his flat tire and that she drove him to his apartment where she left her phone number on a magazine. Simon averred she arrived at her house at approximately 10:00 p.m. Andrea Bell also agreed she visited the defendant at his apartment "on a Friday evening in early November" and learned of his flat tire. According to Bell, she spoke with the defendant the next morning between 8:30 and 9:00 as he left the apartment complex with his wife in her auto. Kimberly Fox White corroborated the defendant's testimony and claimed he was with her in the early morning hours of November 5, 1988.

Private investigator John Younkin told the jury that the distance from defendant's auto on Interstate 71 to the nursing home where White was shot equaled 139.3 miles. According to Younkin, it requires two hours and nineteen minutes to drive this distance at the posted speed limits.

The defendant offered two character witnesses on his behalf. Glenn Frazier, a pastor at the Gospel Palace Church and manager of a radio station where defendant hosted an inspirational program, testified to the defendant's honesty. Bishop F.E. Perry stated the

> defendant had been a minister at their church and was a "family" man. Perry described the defendant as truthful.
>
> In rebuttal, the state called Deborah Brown who swore she spoke with the defendant in Cleveland on the afternoon before the shooting between 3:40 p.m. and 3:55 p.m. The defendant allegedly asked Brown whether she had seen White. Patricia Laster also averred she saw the defendant in his auto between 3:00 p.m. and 4:00 p.m. on November 4, 1988. Both women testified they had observed defendant strike White on previous occasions.

State v. White, No. 1991 WL 8581 at *1-*3 (Ohio Ct. App., Jan. 31, 1991), *aff'd*, 647 N.E.2d 787 (Ohio 1995).

On May 12, 1989, a jury found White guilty of one count of aggravated murder with a firearm specification and two counts of felonious assault with firearm specifications. On May 15, 1989, the trial court sentenced him to 20 years to life for aggravated murder, three years for the firearms specification, and 8-to-15 years on each count of felonious assault, all to be served consecutively. On January 31, 1991, the Ohio Court of Appeals overruled the petitioner's assignments of error, but *sua sponte* ordered the trial court to vacate one of his convictions for felonious assault under the allied offenses doctrine. The court of appeals's decision was journalized on February 11, 1991.

Although the petitioner obtained representation from the Office of the Ohio Public Defender in 1991, the attorney assigned to White's case did not file an application for reopening alleging that his appellate counsel had rendered ineffective assistance in failing to raise four assignments of error until three years later, on February 16, 1994. The court

of appeals denied White's application for reopening, finding it to be untimely based on Ohio App. R. 26(B), which provides:

> A defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel. An application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment unless the application shows good cause for filing at a later time.

The petitioner attached to his application for reopening an affidavit from his attorney stating that he had been assigned White's case in 1991 but had been unable to review the merits of the case until late 1993, as a result of his office's "overwhelming caseload" and his own "personal heavy caseload." White's counsel argued that his heavy caseload served as "good cause," as that phrase is used in Rule 26(B), to excuse his tardiness. The Ohio Court of Appeals rejected that argument, stating that "an applicant's ignorance of App. R. 26(B) or its procedural requirements will not establish good cause for the untimely filing of an application for reopening," and that "an 'office's overwhelming caseload and my personal heavy caseload' does not establish good cause for the untimely filing of an application for reopening as brought pursuant to App. R. 26(B)." The Ohio Supreme Court affirmed that decision, *see State v. White*, 647 N.E.2d 787 (Ohio 1995), and the United States Supreme Court denied certiorari. *See White v. Ohio*, 516 U.S. 892 (1995).

White then filed a petition for writ of habeas corpus in the United States District Court for the Northern District of Ohio, raising the following claims:

> (1) violation of petitioner's rights to due process and a fair trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution on the grounds of prosecutorial misconduct; (2) petitioner's Fifth and Fourteenth Amendment rights against self-incrimination, to due process and a fair trial were denied when the trial court repeatedly allowed introduction of other acts evidence and extrinsic evidence of petitioner's character to be presented to the jury; (3) petitioner's Sixth and Fourteenth Amendment rights to confrontation and cross-examination were denied when the prosecution was permitted to introduce hearsay evidence in the form of prior statements made by the decedent; and (4) petitioner's Sixth and Fourteenth amendment rights to effective assistance of appellate counsel were denied when: [a] appellate counsel failed to raise an issue on appeal that but for counsel's failure there is a reasonable probability that the result of the appeal would have been different and, [b] Ohio provides no remedy for vindication of a denial of the defendant's right to the effective assistance of counsel.

The case was referred to a magistrate judge, who issued a report and recommended that the petition be dismissed because the claims were procedurally defaulted under Ohio App. Rule 26(B) and because the petitioner was unable to show cause and prejudice for the default. Over the petitioner's objections, the district court adopted the magistrate judge's report and recommendation and dismissed

the petition based on procedural default. This appeal followed.

ANALYSIS

White appeals the district court's dismissal of his habeas corpus petition on the basis of procedural default. In considering a district court's disposition of a habeas petition, we review the district court's legal conclusion *de novo*, and its factual findings for clear error. *See Carpenter v. Mohr*, 163 F.3d 938, 942-43 (6th Cir. 1998), *cert. granted*, 120 S.Ct. 444 (1999).

Under *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir.1986), this circuit utilizes the following four-part analysis when the state argues that a federal habeas claim has been procedurally defaulted in state court: (1) whether there is a procedural rule that is applicable to the petitioner's claim and whether the petitioner failed to follow this rule; (2) whether the state courts actually enforced the state procedural rule; (3) whether the state procedural rule is an adequate and independent state ground to foreclose federal relief; and if so (4) whether the petitioner has established cause for his failure to follow the rule and prejudice by the alleged constitutional error.

The petitioner contends that none of the first three factors of the *Maupin* test have been met. He also argues, in the alternative, that even if those three factors have been satisfied, he is able to show cause and prejudice for his default under the fourth factor, thereby entitling him to federal court review of the merits of his habeas corpus claims. He also argues that the court may excuse his procedural default because failure to address the merits of his constitutional claims will result in a fundamental miscarriage

of justice. We consider each of the four *Maupin* factors in turn, addressing petitioner's arguments in the process.

The first *Maupin* factor requires us to consider whether there is a procedural rule that is applicable to the petitioner's claim and whether he failed to follow that rule. The petitioner argues that there was no procedural rule applicable to his claim because Ohio's App. R. 26(B) was not in effect at the time his direct appeal was decided on January 31, 1991, and he filed an application to reopen his appeal as soon as the claim of appellate ineffectiveness was discovered. We find this argument unmeritorious. Although White is correct that prior to July 1, 1993, Rule 26 did not contain a distinct provision for ineffective assistance of counsel claims, it did set forth a ten-day time limit for the "application for reconsideration of any cause or motion submitted on appeal." Following the Ohio Supreme Court's recommendation that the legislature adopt an amendment to better serve defendants who allege ineffective assistance of appellate counsel, *see State v. Murnahan*, 584 N.E.2d 1204 (Ohio 1992), Rule 26(B) was enacted to provide a 90-day limit for ineffective assistance of appellate counsel claims.

Rule 26(B) is clearly applicable to the petitioner's claim and would have required White to file his motion to reopen within 90 days of its effective date, July 1, 1993. However, as the Ohio Court of Appeals noted in denying White's motion to reopen, "[t]he application for reopening ... was not filed ... until February 16, 1994, more than three years after journalization of the appellate judgment, one year and eleven months after the announcement of *State v. Murnahan* (1992), 63 Ohio St. 3d 60, and more than seven months after the effective date of App. R. 26(B). On its face, the application for reopening is untimely." *State of Ohio v. Frederick White*, No. 57944 slip op. at 1-2 (Ohio Ct. App.,

Oct. 19, 1994). We thus conclude that there was an applicable rule in place and that White failed to follow it.

Turning to the second *Maupin* factor, we must consider whether the state courts actually enforced the state procedural rule. The Ohio Court of Appeals held that it was compelled to deny the petitioner's application for reopening because it was untimely under Rule 26(B) and no good cause existed to excuse that untimeliness. The court also said:

> Notwithstanding the fact that the application for reopening is untimely, a substantive review of the applicant's supporting memorandum clearly demonstrates that *res judicata* prevents the reopening of the appellate judgment that was rendered in *State v. White* (Jan. 31, 1991), Cuyahoga App. No. 57944, unreported. The doctrine of *res judicata* prohibits a defendant from relitigating any defense or claim of error that has been previously raised on direct appeal. *State v. Perry*, 10 Ohio St. 2d 175 (Ohio 1967). . . . In an attempt to reopen the appellate judgment that was rendered by this Court, the applicant raises four proposed assignments of error which appellate counsel allegedly failed to argue upon appeal. These four proposed assignments of error address the following issues: (1) other acts testimony (Evid. R. 404); (2) hearsay evidence (Evid. R. 801); (3) extensive evidence to impeach defendant's character (Evid. R. 608); and (4) prosecutorial misconduct. This court, however, has previously examined upon direct appeal each of the applicant's four proposed assignments of error. Through the fourth, fifth, and sixth assignments of error as raised on direct appeal, this Court reviewed the issues of other acts testimony, hearsay evidence, and extrinsic evidence to impeach

> defendant's character. In addition, this court addressed the issue of prosecutorial misconduct in light of the harmless error rule (Crim. R. 52(A)) and held that: "Although the prosecutor repeatedly violated the rules of evidence in this case, we are compelled to find these errors harmless in light of the overwhelming evidence of the defendant's guilt. *State v. Abrams* (1974), 39 Ohio St.2d 53; *Chapman v. California* (1967), 386 U.S. 18. . . ."

Id. at 4-5.

White argues that the appeals court's alternative holding – that his claims would be barred by *res judicata* even if they were not procedurally barred – constitutes a decision on the merits and that his claims, therefore, are not procedurally barred.[1] We cannot agree. As the Supreme Court has explained, "a state court need not fear reaching the

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[1] He argues further that his application for reopening was a nullity because the court held that it had already decided his claims on direct appeal. A review of petitioner's direct appeal brief and the appeals court's resolution reveals that the court had indeed decided the merits of petitioner's claims regarding the admission of other acts testimony, hearsay evidence, and extensive evidence to impeach his credibility, but those claims had only been framed and ruled upon as violations of state law. The import of the claim raised in the application for reopening was that White's appellate counsel rendered ineffective assistance in failing to raise those claims as violations of federal law. Indeed, the petitioner does not contend that he raised those claims as violations of federal law in his direct appeal, but instead that this court should deem it so based on the court of appeals's language in denying the application for reopening.

merits of a federal claim in an *alternative* holding. By its very definition, the adequate and independent state ground doctrine requires the federal court to honor a state holding that is a sufficient basis for the state court's judgment, even when the state court also relies on federal law." *Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989) (emphasis in original); *accord Sochor v. Florida*, 504 U.S. 527, 533 (1992). As we concluded in *Coe v. Bell*, 161 F.3d 320, 330 (6th Cir. 1998), *cert. denied*, 120 S.Ct. 110 (1999), "[t]he alternative holding thus does not require us to disregard the state court's finding of procedural bar."

We turn next to the third *Maupin* factor, which requires us to consider whether the state procedural rule is an adequate and independent state ground to foreclose federal relief. Such a rule is adequate if it is regularly or consistently applied by the state court, *see Johnson v. Mississippi*, 486 U.S. 578, 587 (1988), and is independent if it does not "depend[ ] on a federal constitutional ruling." *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985); *see also Mapes v. Coyle*, 171 F.3d 408, 421 (6th Cir. 1999), *petition for cert. filed*, 68 USLW 3116 (July 29, 1999) No. 99-203) ("[T]he fact that a petitioner has not complied with a state procedural rule cannot bar federal review of constitutional claims if the state rule is not 'firmly established and regularly followed.'") (internal quotation marks and citation omitted)).

White argues that the "good cause" requirement of Ohio's App. R. 26(B) does not constitute an adequate and independent state ground because it is neither firmly established nor uniformly applied by the Ohio courts. In support of his argument, White cites to instances in which courts have allowed delays well after the 90-day deadline and also argues that Rule 26(B) does not provide any clear

guidelines for determining when a petitioner can file his petition beyond the 90-day filing period.

A review of the Ohio court of appeals cases attached to Petitioner's brief reveals that the state courts have not achieved consensus on what constitutes "good cause" to excuse non-compliance with Rule 26(B). *See, e.g., State v. McCarter*, No. 62346 (Ohio App. 8 Dist., Aug. 12, 1994) (holding pro se status and ignorance of the law did not constitute "good cause" to excuse filing of application for reopening almost three years after journalization and seven months after effective date of new Rule 26(B)); *State v. Nitenson*, No. 91 CA 796, 1994 WL 69894 (Ohio App. 4 Dist., Feb. 24, 1994) (holding *pro se* status constitutes good cause to excuse filing of an application for reopening over one year after journalization of appellate judgment); *State v. Klein*, No. 49260 (Ohio App. 8 Dist., March 15, 1994) (holding *pro se* status and ignorance of law did not constitute "good cause" to excuse filing of application for reopening five months after journalization and two months after effective date of new Rule 26(B)); *State v. Wright*, No. 93 CA 2110, 1994 WL 398805 (Ohio App. 4 Dist., July 29, 1994) (holding state's failure to respond to an application for reopening constitutes "good cause"); *State v. Fields*, No. 95 CA-08-048 (Ohio App. 5 Dist., April 21, 1994) (same); *State v. Wright*, No. 93 CA 2110, 1994 WL 398805 (Ohio App. 4 Dist., July 29, 1994) (same). Nonetheless, we recognize that the rule is relatively new and acknowledge that it may take some time for the Ohio courts to achieve consensus.

In any event, we need not focus on whether the good cause exception to Rule 26(B) constitutes an independent and adequate state ground, because we conclude, upon consideration of the fourth *Maupin* factor, that the petitioner has established cause for his failure to follow the state

procedural rule. *See Coleman v. Thompson*, 501 U.S. 722, 750 (1991) ("In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.") The district court, through the adoption of the magistrate judge's report and recommendation, held that ineffective assistance of appellate counsel did not serve as cause because "[c]ounsel's failure to file a timely application for reopening because he had a heavy case load does not constitute an objective factor external to the defense." We disagree. The external cause for the petitioner's non-compliance with Rule 26(B) is provided by the continued deficiencies in the office of the Ohio Public Defender. Although the petitioner states in his appellate brief that the cause for his procedural default was ineffective assistance of appellate counsel in his direct appeal, it is clear from other portions of his brief, the affidavit from his counsel at the Ohio Public Defender's Office, his arguments before the state courts, and simple logic that the reason the application for reopening was filed three years late was the failure of his attorney to file that pleading in compliance with the rule. As evidenced in the present case and as noted in *Paris v. Turner*, No. 97-4129, 1999 WL 357815 (6th Cir. (Ohio) May 26, 1999), the public defender's office has repeatedly failed to preserve the right of criminal defendants to challenge the constitutionality of their convictions due to its disregard, whether intentional or because of inadequate funding and staffing, of filing deadlines and procedural barriers.

Without question, an attorney's failure or refusal to abide by established time deadlines in handling a client's appeal is conduct falling below the minimal standards of competency that federal case law has imposed upon counsel to satisfy constitutional safeguards. *See Strickland v. Washington*, 466 U.S. 668, 698 (1984) (a finding of ineffective assistance of counsel requires first that an attorney's representation fall below an objective standard of reasonableness). *See also Ludwig v. United States*, 162 F.3d 456, 459 (6th Cir. 1998) (failure to perfect a direct appeal in derogation of a request to do so is a *per se* violation of the Sixth Amendment, regardless of whether the appeal would have been successful). In fact, such deficiencies have been held to constitute ineffective assistance of counsel per se. *See Rodriguez v. United States*, 395 U.S. 327, 330 (1969) ("Those whose right to appeal has been frustrated should be treated exactly like any other appellant; they should not be given an additional hurdle to clear just because their rights were violated at some earlier stage of the proceedings.").

The State of Ohio argues, nevertheless, that a petitioner such as White has no constitutional right to counsel at any stage of criminal proceedings beyond a direct appeal as of right. *See Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987). Without a right to counsel, the petitioner also has no commensurate right to effective assistance from that counsel. However, as this court's decision in *Manning v. Alexander*, 912 F.2d 878, 882 (6th Cir. 1990), made clear, Ohio law does not consider an attack on the adequacy of appellate counsel to be proper in a state habeas proceeding. *See Manning*, 912 F.2d at 882 (citing *Manning v. Alexander*, 553 N.E.2d 264 (Ohio 1990); *In re: Petition of Brown*, 551 N.E.2d 954 (1990)). Furthermore, *Murnahan* emphatically holds that any such attack cannot be considered part of an Ohio post-conviction matter.

If the application for delayed reconsideration is neither part of a state habeas nor state post-conviction proceeding, it must be a continuation of activities related to the direct appeal itself. Because a defendant is entitled to effective assistance of counsel on direct appeal, *see Evitts v. Lucey*, 469 U.S. 387, 396 (1985), such an individual must be accorded effective assistance of counsel throughout *all* phases of that stage of the criminal proceedings. The failure of the Ohio Public Defender to offer such constitutionally-mandated counsel excuses the failure of the petitioner to abide by the timing requirements of applicable procedural rules.

Therefore, upon establishing that he was actually prejudiced by any ineffective representation, the petitioner is entitled to present to a federal court for merit review those claims that should have been brought to the attention of the Ohio state courts throughout the course of the petitioner's legal battles. *See Coleman*, 501 U.S. at 750. Having found no cause for White's default, neither the magistrate judge nor the district judge addressed the prejudice prong. Accordingly, unless there is another basis upon which to excuse the petitioner's procedural default, we must remand to the district court to decide whether the petitioner can establish prejudice.

White claims that there is such an alternative basis to excuse his procedural default, arguing that even if this court finds that he has not shown cause and prejudice, the procedural default should nonetheless be excused because a fundamental miscarriage of justice would result from a failure to entertain the claim. *See id.* In analyzing such a claim, the inquiry is a narrow one, where the petitioner must "point to a constitutional violation that probably resulted in the conviction of one who was actually innocent." *Ritchie v.*

Eberhart, 11 F.3d. 587, 593 (6th Cir.1993); *accord Schlup v. Delo*, 513 U.S. 298, 321 (1997); *Murray v. Carrier*, 477 U.S. 478, 496 (1986). The petitioner argues that the following evidence shows that he is actually innocent:

> There were two eyewitnesses to the crime. Richard Gibson testified he could not identify the perpetrator. Jackie Glenn identified Mr. White but admitted she told the police after the incident that she did not see the assailant because she was pushed aside, out of the way, and had her head down. The State's evidence is contradicted by the evidence presented by White. Mr. White produced credible evidence at his trial that he was in Columbus, Ohio at the time of his ex-wife's murder. In addition to the alibi testimony from his wife, Mr. White introduced testimony from two disinterested witnesses who testified to seeing Mr. White the night before and the morning of the murder in Columbus, Ohio. . . . The State of Ohio convicted Mr. White based upon his past conduct, bad character, hearsay and prosecutorial misconduct.

We conclude that the petitioner has not made a colorable showing of actual innocence under the *Carrier/Schlup* standard. As the petitioner acknowledges, this evidence was presented to the jury, which chose to credit the state's evidence over that offered by the petitioner. Although we might agree with the Ohio Court of Appeals's assessment that the prosecutor violated the rules of evidence in this case, there is no basis for us to second-guess the jury's credibility determination and its resulting verdict. Accordingly, because a miscarriage of justice will not result from the court's failure to review this claim, it does not excuse the petitioner's failure to comply with state procedural rules. *See Ritchie*, 11 F.3d at 593.

However, as previously stated, we conclude that the petitioner has shown cause for his default, and if he is able to demonstrate that he was actually prejudiced by the alleged constitutional error, he is entitled to federal review of the merits of his constitutional claims. Because the issue of prejudice is not adequately briefed, we remand for the district court to consider the issue, keeping in mind the following guidelines for such analysis articulated in *Maupin*, which the court gleaned from various Supreme Court cases: (1) "the prejudice that must be shown must be a result of the alleged constitutional violation and not a result of the trial counsel's failure to meet state procedural guidelines;" (2) "the burden is on the petitioner to show that he was [actually] prejudiced by the alleged constitutional error..., not merely a possibility of prejudice;" and (3) "in analyzing a petitioner's contention of prejudice, the court should assume that the petitioner has stated a meritorious constitutional claim." 785 F.2d at 139 (citations omitted). Of course, if the district court finds that the petitioner has established prejudice, it should proceed to decide the merits of his constitutional claims.

Finally, we note the petitioner's argument that Rule 26(B) is unconstitutional as applied in Ohio because it deprives indigent, incarcerated, uncounseled inmates due process and equal protection of the laws. These claims were not raised in the district court, however. "When a party fails to present an argument to the district court, we have discretion to resolve the issue only where the proper resolution is beyond any doubt, or where injustice might otherwise result." *See Enertech Elec., Inc. v. Mahoning County Comm'r*, 85 F.3d 257, 261 (6th Cir. 1996). We decline, in this instance, to treat these issues as a matter of initial review.

CONCLUSION

We conclude that Ohio criminal defendants have a federal constitutional right to effective assistance of counsel during an application for reopening and that the petitioner's counsel in this case was constitutionally ineffective in failing to file such an application in a timely fashion, thus constituting cause to excuse any failure to comply with the procedural requirements contained in Ohio Rule of Appellate Procedure 26(B). Accordingly, we remand to the district court to consider whether the petitioner has established that he was actually prejudiced by the alleged constitutional error and, if so, to review his constitutional claims on their merits.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 97-4066

FREDERICK WHITE,
Petitioner-Appellant,

v.

JAMES SCHOTTEN, WARDEN
Respondent-Appellee.

Filed: May 10, 2000

Before: KEITH, DAUGHTREY, and MOORE, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF
THE COURT

s/ Leonard Green
LEONARD GREEN, CLERK

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. 1:95-CV-2801

FREDERICK WHITE,
Petitioner

v.

JIM SCHOTTEN, WARDEN,
Respondent.

Filed: August 14, 1997

MEMORANDUM OF OPINION AND ORDER

This matter comes before the Court upon the Report and Recommendation of Magistrate Judge Patricia A. Hemann on July 23, 1996 (Doc. 13). The named Report is hereby ACCEPTED by this Court, along with the findings of fact and conclusions of law therein.

Standard of Review

The applicable standard of review for a magistrate judge's report and recommendation depends upon whether objections were made to that report. When objections are made to a report and recommendation of a magistrate judge,

the district court reviews the case *de novo*. Fed. R. Civ. P. 72(b) provides this standard of review.

> The district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommended decision, receive further evidence or recommit the matter to the magistrate judge with the instructions.

Accordingly, this Court will review *de novo* any portion of a magistrate judge's report and recommendation to which timely objections have been filed. *See Massey v. City of Ferndale*, 7 F.3d 506 (6th Cir. 1993).

Conclusion

This Court has reviewed *de novo* the Report and Recommendation of the instant case to which timely objections were filed. This Court has considered all of the filings, motions and evidence submitted by the parties, and adopts in their entirety the findings of fact and conclusions of law of Magistrate Judge Hemann as its own. The Court agrees with the conclusion that petitioner procedurally defaulted in state court and has failed to show good cause for that default. Petitioner's objections to the report are unsubstantiated by applicable law.

For the foregoing reasons, the Report and Recommendation of Magistrate Judge Hemann is hereby ACCEPTED. Consistent with the ruling, Frederick White's

petition for a writ of habeas corpus is denied. Pursuant to 28 U.S.C. §1915(a), this Court certifies that an appeal could not be taken in good faith. This Court declines to issue a certificate of appealability as to any issue raised by petitioner. 28 U.S.C. §2253(c). FRAP 22(b).

IT IS SO ORDERED.

s/Patricia A. Gaughan
PATRICIA A. GAUGHAN,
United States District Judge

JUDGMENT ENTRY

This Court, having filed its Memorandum of Opinion and Order denying Frederick White's petition for a writ of habeas corpus, hereby enters judgment in favor of respondent and against petitioner. Pursuant to 28 U.S.C. §1915(a), this Court certifies that an appeal could not be taken in good faith. This Court declines to issue a certificate of appealability as to any issue raised by petitioner. 28 U.S.C. §2253(c). FRAP 22(b).

IT IS SO ORDERED.

s/Patricia A. Gaughan
PATRICIA A. GAUGHAN,
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. 1:95-CV-2801

FREDERICK WHITE,
Petitioner

v.

JIM SCHOTTEN, WARDEN,
Respondent.

Filed: July 23, 1996

MAGISTRATE JUDGE'S
REPORT AND RECOMMENDATION

This matter is before the magistrate judge pursuant to Local Rule 5:1.2(d). Before the court is Frederick White's ("White") petition for a writ of habeas corpus filed pursuant to Title 28, United States Code section 2254 on December 27, 1995, Williams is in the custody of the Ohio Department of Rehabilitation and Correction pursuant to a journal entry of sentence in the case of *State of Ohio v. Frederick White*, Case No. CR-236521 (Cuyahoga Cty. 1989). For the reasons set forth below, the magistrate judge recommends that the petition be denied.

In January 1989 the Cuyahoga County Grand Jury returned a four count indictment against White for Aggravated Murder with a gun specification; two counts of Felonious Assault with a gun specification; and Having a Weapon while under Disability with a gun specification. Prior to trial, the court severed the count of having a weapon under a disability. On May 12, 1989 a jury found White guilty of the three remaining courts in the indictment. He was sentenced to a term of twenty years to life for aggravated murder and two terms of eight to fifteen years for each of the felonious assault convictions. The court ordered the sentences to be served consecutively.

The convictions arose out of the fatal shooting of White's former wife, Kimberly Hawkins White, outside the nursing home at which she was employed. At the end of her shift, Ms. White asked one of her coworkers, Jacqueline Glenn, for a ride home. Ms. Glenn replied that she was being picked up by a friend, Richard Gibson. The two women walked to Mr. Gibson's van and he agreed to drive Ms. White home. As the women were entering the van, a man ran from behind a nearby tree and fired a shotgun at Ms. White. Three or four shots were fired, one shot hit Ms. White's foot and a second shot hit her abdomen, perforating her aorta. Ms. Glenn heard Ms. White shout, "Wait, Rick, wait." Mr. Gibson heard the decedent state that her husband shot her.

During the police investigation, Ms. Glenn identified White's picture as the assailant from an array of five photographs. Mr. Gibson was unable to make an identification. A police officer who responded to the scene and a nun who worked at the nursing home testified during White's trial that they heard the wounded Ms. White identify her husband as the assailant. There also was testimony that White had a history of physically abusing Ms. White. White

denied killing his former wife and testified that he was in Columbus, Ohio at the time of the shooting. White's wife at the time of incident corroborated his testimony, stating that White was with her during the morning of the shooting.

Following his conviction, White filed a direct appeal with the Eighth District Court of Appeals raising the following assignments of error.

I. The evidence is insufficient to sustain the conviction of felonious assault relating to Richard Gibson.

II. The trial court erred in failing to suppress identification testimony arising from an unduly suggestive photographic array.

III. The trial court erred and denied appellant a fair trial by limiting appellant's scope of cross-examination of the state's witness in violation of Ohio Rules of Criminal Procedure 16(B)(1)(g).

IV. The trial court erred by allowing prejudicial other acts evidence into evidence.

V. The trial court erred by allowing a prejudicial hearsay statement of the deceased into evidence.

VI. The trial court erred by allowing extrinsic evidence of bad conduct of the appellant to be received by the jury in contravention of Ohio Rule of Evidence 608(b).

VII. The trial court erred by prohibiting the testimony of a psychologist regarding eyewitness testimony and the human memory.

On January 31, 1991 the court of appeals vacated one of the felonious assault convictions, finding that the two felonious assault convictions were allied offenses of similar import and the record failed to show the defendant acted with the distinct animus necessary to support two separate convictions. The murder conviction and the second felonious assault conviction were upheld. White did not appeal the decision of the Eighth District Court of Appeals to the Ohio Supreme Court.

Three years later, in February 1994, White filed an application to reopen his direct appeal in the Eighth District Court of Appeals. White argued that his appellate counsel was ineffective because counsel failed to raise the following four assignments of error in the direct appeal:

I. The appellant was denied the right to due process and a fair trial, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, sections 10 and 16 of the Ohio Constitution, on the grounds of prosecutorial misconduct.

II. Appellant's Fifth and Fourteenth Amendment rights against self-incrimination and to due process of law are denied when a trial court repeatedly allows introduction of other acts evidence at trial.

III. Appellant's Sixth and Fourteenth Amendment rights to confrontation and cross-examination

are denied when the state is permitted to introduce hearsay evidence in the form of prior statements of the deceased.

IV. Appellant's Fifth and Fourteenth Amendment rights to due process and a fair trial are violated when the state is permitted to introduce extrinsic evidence to impeach appellant's character.

On October 19, 1994 the Eighth District Court of Appeals denied the application for reopening, finding that White did not assert good cause for failing to file his application within 90 days after journalization of the appellate judgment as required by statue. The court of appeals also reviewed White's supporting memorandum and concluded that his claims were barred by *res judicata* because they had previously been raised on direct appeal.

White appealed the Eighth District Court of Appeals decision to the Ohio Supreme Court raising three propositions of law:

I. A criminal defendant is denied his state and federal constitutional rights to the effective assistance of appellate counsel when the court of appeals ignores all meritorious ineffective assistance of appellate counsel claims filed later than ninety days from the court of appeals' decision on direct appeal.

II. The misapplication of the doctrine of res judicata to claims of ineffective assistance of appellate counsel denies an appellant due process and denies him a remedy to address

such claims, in violation of the due process clauses of the Ohio and United States Constitutions and in violation of Article I, section 16, of the Ohio Constitution.

III. A defendant's federal constitutional right to the effective assistance of appellate counsel is denied when counsel fails to raise an issue on appeal that, if raised, there was a reasonable probability the result of the appeal would have been different.

On April 26, 1995 the Ohio Supreme Court affirmed the judgment of the court of appeals consistent with the opinion of that court.

White is now before this court seeking a writ of habeas corpus pursuant to 28 U.S.C. §2254. He states four claims for relief as follows:

I. Violation of petitioner's rights due process and a fair trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution on the grounds of prosecutorial misconduct.

II. Petitioner's Fifth and Fourteenth Amendment rights against self incrimination, to due process and a fair trial were denied when the trial court repeatedly allowed introduction of other acts evidence and extrinsic evidence of petitioner's character to be presented to the jury.

III. Petitioner's Sixth and Fourteenth Amendment rights to confrontation and cross-examination

were denied when the prosecution was permitted to introduce hearsay evidence in the form of prior statements made by the decedent.

IV. Petitioner's Sixth and Fourteenth Amendment rights to effective assistance of appellate counsel were denied when: (1) appellate counsel failed to raise an issue on appeal that but for counsel's failure there is a reasonable probability that the result of the appeal would have been different and, (2) Ohio provides no remedy for vindication of a denial of the defendant's right to the effective assistance of appellate counsel.

Respondent filed a Return of Writ on February 26, 1996. Petitioner filed a reply on April 5, 1996. Thus the petition is ready for decision.

II

1. Jurisdiction

Petitioner is in the custody of the State of Ohio at the Trumbell Correctional Institution in Trumbell County, Ohio. Petitioner filed his writ of habeas corpus in the Northern District of Ohio and raises claims regarding the constitutionality of his incarceration under 28 U.S.C. §2254.

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in

> custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. §2254(a). This court has jurisdiction over petitioner's claims.

2. Evidentiary Hearing

The habeas corpus statute authorizes an evidentiary hearing when the factual findings of the court were inadequately developed, their reliability has been questioned, or relevant facts are in dispute. 28 U.S.C. §2254(d). There is no need for an evidentiary hearing in the instant case. All of petitioner's claims involve legal issues which can be independently resolved without additional factual inquiry.

3. Exhaustion of State Remedies

Prior to seeking review of conviction by federal habeas corpus, a state prisoner must exhaust all remedies available in state court. 28 U.S.C. §2254(b) and (c); *Castille v. Peoples*, 489 U.S. 346, 349 (1989); *Riggins v. McMackin*, 935 F.2d 790, 793 (6th Cir. 1991). The prisoner must fairly present any claims to the state in a constitutional context. *Anderson v. Harless*, 459 U.S. 4 (1982); *Picard v. Connor*, 404 U.S. 270 (1971); *Shoultes v. Laidaw*, 886 F.2d 114, 117 (6th Cir. 1989). The exhaustion requirement is satisfied when the highest court in the state where petitioner was convicted has been given a full and fair opportunity to rule on all of the petitioner's claims. *Manning v. Alexander*, 912 F.2d 878, 881-83 (6th Cir. 1990).

White filed a direct appeal of his conviction in the Eighth District Court of Appeals and thereafter filed an application to reopen that decision which he appealed to the Ohio Supreme Court. The State acknowledges that White

does not have a remaining state court remedy available to him and concludes that White has met his exhaustion requirement. Petitioner does not identify any remaining remedy in the state courts. Therefore, this court will consider White's habeas claims exhausted.[1]

III

Respondent argues that White's four habeas claims are procedurally defaulted because the state appellate and supreme courts did not reach the merits of his claims in his application for reopening. The Eighth District Court of Appeals held that White did not comply with the requirement of Ohio App. R. 26(B) that good cause be shown for filing an application for reopening more than 90 days after journalization of the appellate judgment. The Ohio Supreme Court affirmed consistent with the opinion of the court of appeals. The State argues that because the Ohio state courts relied on this procedural bar in denying review of the merits of the claims raised in the application for reopening, federal habeas review is precluded. White responds that his habeas claims have not been procedurally defaulted because App. R. 26(B) did not exist at the time of his direct appeal in 1991, and therefore he could not comply with the 90 day rule.

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[1] White did not file a direct appeal in the Ohio Supreme Court. Where an appellant has not filed a direct appeal, he may file a delayed appeal under S. Ct. Prac. R. II section 2(A)(4). It is unlikely, however, that the Ohio Supreme Court would allow White's delayed appeal where it is filed five years after the court of appeals entered its judgment, White has not asserted cause for his failure to timely file a direct appeal, and he did appeal his application for reopening his direct appeal to the Ohio Supreme Court.

If a prisoner fails to follow a state court procedural rule, and this procedure default, distinct from federal constitutional grounds, is an adequate and independent state ground for the court's decision, the prisoner is barred from subsequent federal habeas corpus review of his claims. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). An exception is made, however, where the prisoner can show cause for the default and actual prejudice as a result of the alleged violation of federal law or can demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice. *Id.* A habeas petitioner who fails to comply with a state's procedural rule deprives the state courts of an opportunity to reach the merits of the federal claims. *Id.* at 731.

A federal habeas petitioner's procedural default precludes review "only if the last state court rendering a judgment in the case rests its judgment on the procedural default." *Harris v. Reed*, 489 U.S. 255, 262 (1989). In White's case, the last state court to render judgment was the Ohio Supreme Court, which review White's application for reopening an issue a one page order affirming the judgment of the court of appeals consistent with that court's opinion. (State's exh. L.) Because the Ohio Supreme Court adopted the opinion of the court of appeals, this court will look to the court of appeals decision to determine whether it relied upon an independent and adequate state ground. *See Yist v. Nunnemaker*, 501 U.S. 797, 803 (1991) (holding that where there has been one reasoned state court judgment, a federal habeas court should consider later unexplained orders upholding that judgment as resting upon the same ground).

The court of appeals denied White's application for reopening because the court found that he did not show good cause for filing his application for reopening more than 90

days after entry of the original appellate judgment. (State's exh. H.) Under Ohio law an application for reopening must be filed in the court of appeals within 90 days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time. Ohio App. R. 26(B)(1). The court of appeals clearly and expressly stated that its judgment rested on a procedural bar and did not reach the merits of White's claims. Because the last state court rendering a judgment in White's case rested its judgment on a procedural bar, this court is precluded from reviewing his habeas claims.[2]

In his Return of Writ, petitioner argues that he did not procedurally default his claims because he could not have complied with the 90 day rule of Ohio app. R. 26(B)(1) since the rule did not exist at the time that his direct appeal was decided. The judgment in White's direct appeal was journalized on February 11, 1991. App. R. 26(B)(1), which amended original App. R. 26 to provide for an application for

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[2] White's first three claims in his habeas petition assert due process violations, arguing that the prosecution engaged in misconduct by introducing evidence of prior bad acts, prejudicial hearsay evidence, vouching for the credibility of witnesses, and making improper closing arguments; and, additionally, that the trial court admitted other acts evidence, extrinsic character evidence and hearsay evidence in the form of prior statements made by the decedent. White's fourth claim asserts ineffective assistance of appellate counsel and failure of the Ohio Courts to provide a remedy. The gist of the due process claims was raised in White's application for reopening. He also asserted ineffective assistance of appellate counsel. The second part of his appellate counsel claim was not raised in the state courts; it asserts that Ohio App. R. 26(B) is unconstitutional.

reopening within 90 days of the journalization of the appellate judgment, was enacted on July 1, 1993. White filed his application for reopening on February 16, 1994. At the time that he filed his application for reopening, White knew that he had not complied with the 90 day requirement. App. R. 26(B)(1), however, provides that a petitioner may file outside the 90 day period if he shows good cause for filing at a later time. When he filed his application for reopening, White attempted to establish good cause for the untimely filing by submitting an affidavit in which his counsel stated that his application was not timely filed due to counsel's heavy caseload. (State's exh. H, p. 2.) The court of appeals found that White did not establish good cause because lack of counsel to prosecute an application for reopening does not excuse an applicant's late filing. Therefore, White's attempt to use the new rule failed.[3]

White's argument that the good cause requirement should not be applied to him because App. R. 26(B)(1) did not exist within 90 days of the journalization of the appellate judgment in his direct appeal was found invalid in a similar case by the Ohio Supreme Court. In *State v. Reddick*, 72 Ohio St. 3d 88, 647 N.E.2d 784 (1995), the court considered an application for reopening filed in 1993 that sought to reopen a judgment entered in 1987. The court noted that prior to enactment of App. R. 26(B), a defendant seeking to claim ineffective assistance of appellate counsel could file his claim under App. R. 26 and App. R. 14(B), which allowed

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[3] White's counsel explains that he attempted to use the new rule in order to separately assert the prosecutorial misconduct claim and to raise the due process claims in the state court as federal constitutional issues because White's original appellate counsel failed to do so. (Reply to Return of Writ, pgs. 4-5.)

for enlargement of the ten day time period in Rule 26 for "good cause shown." 72 Ohio St. 3d at 90. The court held that "an applicant who seeks to reopen an appellate judgment journalized before July 1, 1993 may not simply rely on the fact that App. R. 26(B) did not exist within the ninety days following journalization of the appellate judgment, but must show good cause why he or she did not attempt to invoke the procedures available under former App. R. 26 and 14(B)." *Id.* White has not shown good cause for his failure to make the appropriate motion prior to 1993; therefore he has procedurally defaulted his claims under both App. R. 26(B) and the previously available remedy.

White alternatively argues that he did not procedurally default because his habeas claims I, II and III were raised in his direct appeal to the Eighth District Court of Appeals, which addressed the merits of the claims. White, however, did not appeal the court of appeals decision to the state supreme court. The only appeal that White made to the Ohio Supreme Court was the appeal of the court of appeals' denial of his application for reopening, which the Ohio Supreme Court affirmed on procedural grounds. Further, as White acknowledges, the claims in his direct appeal were made on state procedural grounds and not in a federal constitutional context.[4]

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[4] White argues that the Eighth District Court of Appeals ruled that it had considered the evidentiary issues in a federal constitutional context when the court held that White's federal claims raised in the application for reopening were barred by the doctrine of *res judicata* because they had been considered in the direct appeal. The court of appeals, however, both in the direct appeal and in the application for reopening, addressed the claims in a state evidentiary context. Errors in the application of state law, especially rulings

Having determined that White procedurally defaulted on his claims, the court will consider whether he has established cause and prejudice or a fundamental miscarriage of justice. "To establish cause a petitioner must present a substantial reason to excuse his procedural default." *Rust v. Zent*, 17 F.3d 155 (6th Cir. 1994). White asserts ineffective assistance of appellate counsel as cause for his failure to timely file his application for reopening. Although attorney error can constitute cause for a procedural default, the existence of cause turns on "whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 447 U.S. 478, 488 (1986). Examples of external impediments are situations where the factual or legal basis for a claim is not available to counsel or interference by state officials prevents attorney compliance with a rule. *Id.* "Attorney ignorance or inadvertence is not 'cause' because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must 'bear the risk of attorney error.'" *Coleman*, 501 U.S. at 752. Counsel's failure to file a timely application for reopening because he had a heavy case load does not constitute an objective factor external to the defense. To accept the explanation of a large work load as cause to excuse the timely filing of motions would vitiate the requirement of timely filings altogether. Therefore, White has not shown cause for his procedural default. Because White has not established cause, the court will not consider prejudice.

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regarding the admission or exclusion of evidence, are not cognizable in federal habeas corpus unless there is a denial of fundamental fairness. *Cooper v. Sowders*, 837 F.2d 284, 286 (6th Cir. 1988).

Finally, this is not a cause where a procedural default should be excused in order to prevent a fundamental miscarriage of justice. White has not produced evidence that he is actually innocent of the murder of his ex-wife. An eyewitness identified White as the man who shot his wife. An employee identified White as the man she noticed standing outside the nursing home on the morning of the murder. The decedent's daughter testified that White had threatened her mother on the night preceding the murder. White had a history of physically abusing his wife. A reasonable juror could have convicted White of the murder of his wife. Because there is no showing of actual innocence, White is not entitled to an exception to the cause and prejudice rule. White has failed to demonstrate either cause and prejudice or actual innocence to excuse his procedural default.

IV

For all of the above reasons, the magistrate judge recommends that White's petition for a writ of habeas corpus be denied.

Date: 7/19/96

s/Patricia A. Hemann
Patricia A. Hemann
United States Magistrate Judge

OBJECTIONS

Any objections to this Report and Recommendation must be filed with the Clerk of Courts within ten (10) days of receipt of this notice. Failure to file objections within the specified time waives the right to appeal the District Court's

order. *See United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). *See also Thomas v. Arn*, 474 U.S. 140 (1985), *reh'g denied*, 474 U.S. 1111 (1986).

APPENDIX E

IN THE SUPREME COURT OF OHIO

Case No. 94-2467

THE STATE OF OHIO,
Appellee,

v.

FREDERICK WHITE,
Appellant.

February 7, 1995, Submitted
April 26, 1995, Decided

Appeal from the Court of Appeals for Cuyahoga County,
No. 57944.

According to the court of appeals' opinion, appellant, Frederick White, was convicted of aggravated murder and felonious assault with firearm specifications. The appellate court vacated one of the felonious assault counts, but affirmed the remaining convictions. State v. White (Jan. 31, 1991), Cuyahoga App. No. 57944, unreported, 1991 WL 8581. It is undisputed that on February 16, 1994, appellant filed an application to reopen his appeal pursuant to App.R. 26(B), alleging ineffective assistance of appellate counsel. Attached to the application was counsel's affidavit stating that any delay in filing the application was due to counsel's heavy work load and was not caused by appellant. Nevertheless, the court of appeals held that appellant had

failed to establish good cause for filing the application more than ninety days after the appellate judgment was journalized, as required by App.R. 26(B)(1) and (2)(b). The court also held that appellant's claims had previously been raised on direct appeal and were, therefore, res judicata. Appellant now appeals to this court.

Stephanie Tubbs Jones, Cuyahoga County Prosecuting Attorney, and *George J. Sadd*, Assistant Prosecuting Attorney, for appellee.

David H. Bodiker, Ohio Public Defender, *Kort Gatterdam*, Assistant Public Defender, and *Gloria Eyerly*, Chief Counsel, for appellant.

MOYER, C.J., DOUGLAS, RESNICK, F.E. SWEENEY, PFEIFER AND COOK, JJ., concur. WRIGHT, J., dissents.

Per Curiam. The judgment of the court of appeals is affirmed for the reasons stated in its opinion.

Judgment affirmed.

WRIGHT, J., dissenting. I must respectfully dissent because I believe that this court should not take such a rigid attitude toward standards that will suffice for "good cause."

As evidence of good cause, defense counsel in this case filed an affidavit that stated, in part: "Due to our office's overwhelming caseload and my personal heavy caseload, I was unable to review the merits of Mr. White's case until late 1993. The delay in filing this application is an unavoidable consequence of our statutory mandate (R.C. 120.06) to review any inmate['s] claim that he is unlawfully

incarcerated. The delay was not caused by Appellant, Rick White."

The court of appeals held that this did not establish good cause for the untimely filing of an application for reopening. The court premised its reasoning on the fact that counsel is charged with full knowledge of the time limitations of App.R. 26(B). *State v. Klein* (Apr. 8, 1991), Cuyahoga App. No. 58389, unreported, 1991 WL 41746, reopening disallowed (Mar. 15, 1994), affirmed (1994), 69 Ohio St.3d 1481, 634 N.E.2d 1027. The court further reasoned that the lack of counsel does not excuse an applicant from filing a timely application for reopening. *State v. McCarter* (Apr. 8, 1993), Cuyahoga App. No. 62346, unreported, 1993 WL 107800, reopening disallowed (Aug. 12, 1994).

The application of both premises defies the realities present in our system and ignores the concept of justice.

It was not lack of knowledge of the time limitations of App.R. 26(B) that prevented counsel from filing the application for reopening within ninety days. It is well known that the Office of the Public Defender is understaffed and overworked with a heavy caseload. For numerous reasons, it is almost impossible for a public defender to meet the ninety-day requirement for filing an application for reopening in this type of case. Particularly relevant is the fact that most public defenders do not even *receive* the request for assistance of counsel until after the ninety-day requirement has expired. Also relevant is the fact that with over forty thousand potential clients, it defies reality to believe that the Public Defender will be able to identify, review and file an application for reopening within ninety days. The effect of the rigid application proposed by the court of appeals and

affirmed by the majority is that an indigent, incarcerated, and uncounseled appellant is being denied the fundamental constitutional rights that App.R. 26(B) was designed to protect.

As for the assertion that lack of counsel does not excuse the untimely application for reopening, the majority places a great deal of faith in the ability of a layperson, within ninety days, to realize that his appellate counsel was ineffective, realize why the appellate counsel was ineffective, and understand how to ask the court of appeals to address the ineffectiveness. All this when, in most cases, the indigent incarcerated inmate does not receive the court of appeals' decision from his or her appellate lawyer in a timely fashion, if at all. My word, what a statute!

The court of appeals quotes, at length, *Drake v. Bucher* (1966), 5 Ohio St.2d 37, 34 O.O.2d 53, 213 N.E.2d 182, which discusses the importance of adhering to the rules of the court. I agree with the premise that in the interest of judicial economy and for the protection of individuals, the rules of the court must be followed. However, the rules should not be followed so rigidly that fundamental constitutional rights are jeopardized or destroyed as in the case before us.

Accordingly, I must respectfully dissent.

APPENDIX F

IN THE COURT OF APPEALS OF OHIO
EIGHTH DISTRICT
COUNTY OF CUYAHOGA

No. 57944

STATE OF OHIO,
Plaintiff-Appellee,

v.

FREDERICK WHITE,
Defendant-Appellant.

Filed: October 19, 1994

JOURNAL ENTRY

Applicant, Frederick White, has filed an application for reopening pursuant to App. R. 26(B). The applicant is attempting to reopen the appellate judgment that was rendered in *State v. White* (Jan. 31, 1991), Cuyahoga App. No. 57944, unreported. The judgment of this Court affirmed the applicant's conviction for the offenses of aggravated murder (R.C. 2903.01) and felonious assault (R.C. 2903.11) with firearm specifications.

As mandated by App. R. 26(B)(2)(b), an application for reopening shall establish "a showing of good cause for untimely filing if the application is filed more than ninety days after journalization of the appellate judgment." Herein,

the applicant seeks to reopen the appellate judgment that was journalized on February 11, 1991. The application for reopening, however, was not filed with this Court until February 16, 1994, more than three years after journalization of the appellate judgment, one year and eleven months after the announcement of *State v. Murnahan* (1992), 63 Ohio St.3d 60, and more than seven months after the effective date of App. R. 26(B). On its face, the application for reopening is untimely.

In an attempt to establish good cause for the untimely filing of the application for reopening, applicant's counsel has filed an affidavit which provides in pertinent part that:

> I was assigned the case of *State v. Frederick White* in 1991. I have reviewed the appellate documents, trial documents and entire trial transcript. Due to our office's overwhelming caseload and my personal heavy caseload, I was unable to review the merits of Mr. White's case until late 1993. The delay in filing this application is an unavoidable consequence of our statutory mandate (R.C. 120.06) to review any inmates claim that he is unlawfully incarcerated. The delay was not caused by Appellant, Rick White.

This Court has specifically held that an applicant's ignorance of App. R. 26(B) or its procedural requirements will not establish good cause for the untimely filing of an application for reopening. *State v. Klein* (April 8, 1991), Cuyahoga App. No. 58389, unreported, reopening disallowed (March 15, 1994), Motion No. 49260, affirmed (1994), 69 Ohio St.3d 1481. In addition, this Court has established that the lack of counsel to prosecute an

application for reopening does not excuse an applicant from filing an untimely application for reopening. *State v. McCarter* (April 8, 1993), Cuyahoga App. No. 62346, unreported, reopening disallowed (Aug. 12, 1994), Motion No. 43167 at 2-3. Based upon *Klein* and *McCarter*, we now hold that an "office's overwhelming case load and my personal heavy caseload" does not establish good cause for the untimely filing of application for reopening as brought pursuant to App. R. 26(B). It must also be noted that applicant's counsel, as a member of the bar, is charged with full knowledge of the time limitations of App. R. 26(B) and that counsel has not set forth any other rationale which establishes good cause for the untimely filing of the application for reopening.

> There is no excuse for the failure of any member of the bar to understand or to comply with the rules of this court. They are promulgated so that causes coming before the court will be presented in a clear and logical manner, and any litigant availing himself of the jurisdiction of the court is subjected thereto. Not to be minimized is the necessity of compliance as an accommodation to the correct dispatch or the court's business. But our over-arching concern is that the legitimate interests of litigants be protected to the utmost. To this end, our profession is committed, and adherence to our rules should be dedicated.
>
> In order to promote justice, the court exercises a certain liberality in enforcing a strict attention to its rules, especially as to mere technical infractions. But a substantial

> disregard of the whole body of these rules cannot be tolerated. As observed in *Sullivan v. Holbrook*, 211 Mo. 99, 104, 109 S.W. 668:
>
> "The rules of appellate practice in hand are simple and plain. They fill no office of mere red tape, or as a show of surface routine. To the contrary, they have substance, and carry on their face the obvious purpose to aid appellate courts in getting at the right of a cause. Hence, apparently, they be-speak the dignity arising from obedience. If they are not to be obeyed, they should be done away with once for all. A just rule, fairly interpreted and enforced, wrongs no man. Ostensibly enforced, but not, it necessarily wrongs some men, *viz.*: those who labor to obey it – the very ones it should not injure. If the rules in question stand for something and are ever to be enforced, they should be put in motion in this case. ***

Drake v. Bucher (1966), 5 Ohio St.2d 37, at 39.

Thus, we find that the applicant's application for reopening is untimely and must be denied. *State v. Otis* (Jan. 23, 1992), Cuyahoga App. No. 59685, unreported, reopening disallowed (July 6, 1994), Motion No. 52993; *State v. Miller* (July 2, 1992), Cuyahoga App. No. 60678, unreported, reopening disallowed (Feb. 22, 1994), Motion No. 48064; *State v. Shepherd* (April 22, 1982), Cuyahoga App. No. 44014, unreported, reopening disallowed (Feb. 28, 1994), Motion No. 49026.

Notwithstanding the fact that the application for reopening is untimely, a substantive review of the applicant's supporting memorandum clearly demonstrates that *res judicata* prevents the reopening of the appellate judgment that was rendered in *State v. White* (Jan 31, 1991), Cuyahoga App. No. 57944, unreported. The doctrine of *res judicata* prohibits a defendant from relitigating any defense or claim of error that has been previously raised upon direct appeal. *State v. Perry* (1967), 10 Ohio St.2d 175. It should also be noted that *State v. Murnahan* (1992), 63 Ohio St.3d 60, upon which App. R. 26(B) is based, provides that ordinary principles of *res judicata* are applicable to an application for reopening unless "circumstances render the application of *res judicata* unjust." *State v. Murnahan*, supra at 66. See, also, *State v. Graham* (June 12, 1975), Cuyahoga App. No. 33350, unreported, reopening disallowed (July 21, 1994), Motion No. 52742; *State v. Barnes* (March 24, 1986), Cuyahoga App. No. 50318, unreported, reopening disallowed (March 4, 1994), Motion No. 36463.

In an attempt to reopen the appellate judgment that was rendered by this Court, the applicant raises four proposed assignments of error which appellate counsel allegedly failed to argue upon appeal. These four proposed assignments of error address the following issues: (1) other acts testimony (Evid. R. 404); (2) hearsay evidence (Evid. R. 801); (3) extensive evidence to impeach defendant's character (Evid. R. 608); and (4) prosecutorial misconduct.

This Court, however, has previously examined upon direct appeal each of the applicant's four proposed assignments of error. Through the fourth, fifth and sixth assignments of error as raised upon direct appeal, this Court reviewed the issues of other acts testimony, hearsay evidence and extrinsic evidence to impeach defendant's character. In

addition, this court addressed the issue of prosecutorial misconduct in light of the harmless error rule (Crim. R. 52(A)) and held that:

> Although the prosecutor repeatedly violated the rules of evidence in this case, we are compelled to find these errors harmless in light of the overwhelming evidence of the defendant's guilt. *State v. Abrams* (1974), 39 Ohio St.2d 53; *Chapman v. California* (1967), 386 U.S. 18. The record demonstrates the victim identified her assailant as her husband, Rick. The deceased's declarations in this regard were unassailed by the defense. Kozel's eyewitness identification placed the defendant at the nursing home minutes before the shooting and Glenn identified the defendant as the man who shot White. Further Brown and Laster placed the defendant in Cleveland in the late afternoon before White's death. Brown testified the defendant was looking for White. Finally, the victim's daughter averred the defendant threatened, on the evening before the slaying, "to do something" bad to her mother.
>
> We are compelled to caution the prosecutor against the repeated violation of evidentiary rules. Although his misconduct was harmless in the instant case, the effect of such cumulative error in a weaker case can result in reversal. See, e.g., *State v. Oliver* (Oct. 17, 1985), Cuyahoga App. No. 49613, unreported at 12-24.

State v. White, *supra* at 16.

Res judicata bars the further reconsideration of the issues of other acts testimony, hearsay evidence, extrinsic evidence to impeach defendant's character and prosecutorial misconduct. In addition, the applicant has failed to demonstrate that circumstances render the application of *res judicata* to the present prayer for reopening unjust.

The application for reopening is denied.

SPELLACY, P.J., and

DYKE, J., CONCUR.

s/James M. Porter
JAMES M. PORTER
JUDGE

JOURNALIZED: Oct. 19, 1994